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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PRODUCTION CREDIT ASSOCIATION OF NORTHERN OHIO, *et al.*,
Petitioners,

v.

FARM CREDIT ADMINISTRATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether under the Administrative Procedure Act, 5 U.S.C. § 703, a final regulation purporting to diminish a production credit association's rights to its assets is reviewable in an action for declaratory judgment.

PARTIES TO THE PROCEEDING

Petitioners, appellants below, are Production Credit Association of Northern Ohio; Carl Bensch, individually and officially; Dean Biery, individually and officially; Kenneth Hoot, individually and officially; Ray Murray, individually and officially; and Robert Borough, individually and officially. The individual petitioners are the members of the board of directors of Production Credit Association of Northern Ohio. Respondent, appellee below, is the Farm Credit Administration. The Federal Intermediate Credit Bank of Louisville, listed in the caption of the decision below, was dismissed from the case in the district court by agreement of the parties. As a result of legislation, there is no longer a governor of the Farm Credit Administration nor a Federal Farm Credit Board.

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No. ———

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OF NORTHERN OHIO, *et al.*,
Petitioners,

v.

FARM CREDIT ADMINISTRATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Production Credit Association of Northern Ohio ("PCA") and its directors seek a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to secure judicial review of a final regulation of the Farm Credit Administration ("FCA") that has clouded the PCA's title to its assets and has similarly clouded the assets of many other well managed Farm Credit System institutions.

OPINION BELOW

The opinion of the court of appeals is reported at 846 F.2d 373 (6th Cir. 1988) and is set forth in the Appendix at pp. 1a-5a, *infra*. The memorandum order of the United States District Court for the Northern District of Ohio, which is unreported, is set forth in the Appendix at pp. 6a-18a, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1988 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Code, Title 5 § 703:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

Code of Federal Regulations, Title 12, § 611.1130 is set forth in the Appendix at pp. 23a-25a, *infra*.

STATEMENT OF THE CASE

On September 11, 1985, the FCA published in final form, without prior notice and opportunity for comment, a regulation asserting authority to transfer assets of various financial institutions within the Farm Credit System to other institutions within the system without compensation. Petitioners are operating under the FCA's claim of authority.

The regulation had as one of its purposes to coerce action on the part of certain financial institutions, in-

cluding the petitioner Production Credit Association of Northern Ohio. Indeed, the coercive pre-enforcement effect was apparently the primary goal of the FCA, a fact noted by the Congressional Research Service:

> Should this regulation be ineffective [as a lever to force System institutions to shift resources voluntarily], . . . alternatives (among others) range from legislatively authorizing FCA to make such capital transfers between FCS institutions to reorganizing the entire FCS lending network into one national bank holding company with centralized management.

Congressional Research Service, *Farm Credit System: Legislative Issues* (Issue Brief IB85198 updated 10/04/85), at 10. Neither the regulation nor the Farm Credit Act provided for civil or criminal proceedings for enforcement. Instead, the regulation contemplated that transfers would be made by entries upon the books of the PCA's bank. 12 C.F.R. § 611.1130(d), *infra* App. 24a-25a. Petitioners viewed the regulation as contrary to the Fifth Amendment to the United States Constitution and violative of the Administrative Procedure Act. Finding no other avenue available, they sought review under the Declaratory Judgment Act, seeking, in effect, to quiet title to their assets.

On September 13, 1985, petitioners brought an action in the United States District Court for the Northern District of Ohio seeking declaratory judgment and injunctive relief, *inter alia*, to eliminate the cloud on the PCA's assets posed by the regulation, then codified at 12 C.F.R. § 611.1145, later recodified at 12 C.F.R. § 611.1130. Jurisdiction was invoked under 28 U.S.C. §§ 1331 and 1332. A motion for a temporary restraining order was denied on September 17, 1985, leaving open the possibility of a preliminary injunction. Respondents moved for dismissal or in the alternative for summary judgment. Argument on the cross motions was held on August 29, 1986.

On March 23, 1987, the district court granted respondents' motion for summary judgment and denied petitioners' motion for preliminary injunction on the ground that the regulation was not ripe for review. Petitioners appealed to the United States Court of Appeals for the Sixth Circuit. On May 17, 1988, the court of appeals affirmed the decision of the district court. In a similar case, the United States Court of Appeals for the Fifth Circuit also held the regulation not ripe for review. *Caprock Plains Federal Bank Ass'n v. Farm Credit Administration*, 843 F.2d 840 (5th Cir. 1988).

REASON FOR GRANTING THE WRIT

The Decision Below Seriously Restricts the Availability of Review under the Administrative Procedure Act, Contrary to *Association of Data Processing Service Organizations v. Camp*, and *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*.

The Administrative Procedure Act provides for review of administrative regulations in civil or criminal enforcement proceedings, unless there has been a prior opportunity for review. 5 U.S.C. § 703. As an alternative to review upon enforcement, litigants have often sought review of agency action prior to enforcement proceedings. Pre-enforcement review of administrative regulations had been allowed in a number of cases before the adoption of the Administrative Procedure Act. As this Court noted in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), these earlier cases involving pre-enforcement review were reinforced by the enactment of the Administrative Procedure Act.

The question in *Abbott* was whether review should be available in advance of civil or criminal proceedings for judicial enforcement. *Abbott* upheld pre-enforcement review in the context of a Food, Drug, and Cosmetic Act regulation, holding that as a result of the adoption of

the APA there is in every case a basic presumption in favor of review. In the FCA regulation involved in this case there is no provision for civil or criminal proceedings for enforcement. Instead, the regulation contemplates what is in essence an extrajudicial implementation. See 12 C.F.R. § 611.1130(d), *infra* App. 24a-25a. The Sixth Circuit, like the Fifth Circuit in *Caprock Plains*, disregarded this aspect of the regulation. The result in this case is that although the regulation is intended to have (and has) a coercive effect prior to the actual taking of private property, there is neither the prospect of review in an FCA action for enforcement nor, under the Sixth Circuit's decision, the possibility of pre-enforcement review, contrary to 5 U.S.C. § 703. Indeed, under the regulation petitioners might learn of a transfer to an insolvent or nearly institution only after the fact.

The decision below is also inconsistent with the Court's post-*Abbott* cases involving the availability of review. Although in *Abbott* the Court cited evidence of hardship to the *Abbott* petitioners in support of its determination that the adoption of a final regulation was ripe for review, in subsequent cases the Court has analyzed hardship under the rubric of standing. The development of the hardship test under the rubric of standing rather than as a threshold determination of ripeness has not detracted from the Court's analysis of hardship in *Abbott*. Instead, it has operated to vindicate the right to pre-enforcement review established in *Abbott*.

Thus, in analyzing standing in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 154 (1970), the Court authorized pre-enforcement review: "Certainly he who is 'likely to be financially' injured, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477, may be a reliable private attorney general to litigate the issues of public interest in the present case." The complaint in *Association of Data Processing Service*

Organizations had alleged, *inter alia*, that for the Comptroller of the Currency to allow national banks to compete against those plaintiffs "might entail some future loss of profits." *Id.* at 152.

The shift from an analysis of ripeness to one of standing is also consistent with the plain meaning of 5 U.S.C. § 702, which provides the right of judicial review to a "person suffering a legal wrong . . . or adversely affected or aggrieved." In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973), this Court noted that to have standing, a "plaintiff must allege that he has been *or will be* perceptibly harmed." [Emphasis added.]

Most recently, in *F.C.C. v. WNCN Listeners Guild*, 450 U.S. 582 (1981), this Court heard and determined on the merits a challenge to a Federal Communications Commission policy statement that the FCC had adopted to govern future adjudications in the nature of broadcast license renewals and transfers. Implicitly, this Court in *WNCN* found even a policy statement to be ripe for review.

Even if there were the possibility of review of the FCA's regulation in proceedings for enforcement, such review would be inadequate to remedy the coercive effect of the regulation prior to enforcement. More importantly, assuming that pre-enforcement coercion is the agency's sole purpose, the effect of the Sixth Circuit's decision would be to deny any effective judicial review, contrary to *Abbott* and its progeny. Indeed, the primary basis of the *Abbott* decision was the effect the FDA regulation would have prior to its enforcement. The regulation at issue in this case, like that at issue in *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974), "by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." *Id.* at 122. *Super Tire* involved a

state regulation providing for public assistance benefits to strikers. An employer had challenged the regulation because it allegedly interfered with the ongoing collective bargaining relationship between labor and management. This Court in *Super Tire* held the regulation reviewable, rejecting claims that it was moot. As this Court noted in terms applicable to the instant case, "In this sense petitioners allege a colorable claim of injury from an extant and fixed policy directive. . . . That claim deserves a hearing." *Id.* at 124.

Since *Abbott*, this Court has not held any final regulation unreviewable under a ripeness theory. But even reading *Abbott* in a light most unfavorable to petitioners, as the Sixth Circuit did in this case and as the Fifth Circuit did in *Caprock Plains Federal Bank Ass'n v. Farm Credit Administration*, 843 F.2d 840 (5th Cir. 1988), the regulation was ripe for review. First, the issues presented, the substantive validity of the regulation under the Fifth Amendment and the Farm Credit Act and the procedural validity of the regulation's adoption under the Administrative Procedure Act, are purely legal issues. Second, the adoption of the regulation was final agency action.

The third *Abbott* factor was also met. Resolution of the issues would have fostered effective administration by the FCA. In *Independent Bankers Association of America v. Heimann*, 627 F.2d 486 (D.C. Cir. 1980), a district court's order invalidating agency action was reversed solely because the plaintiff had delayed bringing the action. Prompt resolution of the purely legal issues involved in final agency action is the preferred course. Indeed, if the regulation had been determined valid, Congress would not have found it necessary to enact either the Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 99 Stat. 1678, or the Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568. *See Central Kentucky Production Credit Ass'n v. United States*, 846 F.2d 1460 (D.C. Cir. 1988).

The only serious ripeness issue is whether the final agency action adopting the regulation would have a direct and immediate impact upon the party bringing suit. The district court, without hearing petitioner's case, rejected out of hand the fact that the cloud on petitioners' assets affected interest rates and deterred potential investors. App. 17a. The district court should not have dismissed the complaint unless it appeared beyond doubt that petitioners could prove no set of facts that would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The district court and the court of appeals ignored the "brooding presence" of the regulation, contrary to this Court's holding in *Super Tire*. Petitioners' claim deserves a hearing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 14, 1988

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 87-3390

PRODUCTION CREDIT ASSOCIATION OF NORTHERN OHIO; CARL BENSCH, individually and officially; DEAN BIERY, individually and officially; KENNETH HOOT, individually and officially; RAY MURRAY, individually and officially; ROBERT BOROUGH, individually and officially,
Plaintiffs-Appellants,

v.

FARM CREDIT ADMINISTRATION;
FEDERAL INTERMEDIATE CREDIT BANK OF LOUISVILLE,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Ohio

Decided and Filed May 17, 1988

Before: KEITH and MARTIN, Circuit Judges; and COOK,* District Judge.

BOYCE F. MARTIN, JR., Circuit Judge. Production Credit Association of Northern Ohio appeals a decision

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* The Honorable Julian A. Cook, Jr., United States District Judge for the Eastern District of Michigan, sitting by designation.

granting summary judgment to the Farm Credit Association, Donald J. Wilkinson, Governor of the Farm Credit Administration, the Federal Farm Credit Board and its board. At the heart of this matter is Production Credit's challenge to the validity of a regulation approved by the Federal Board, the policy-making body for the Farm Credit Administration. Because we believe Production Credit's challenge to the regulation is not appropriate for judicial review at this time, we affirm the district court.

The regulation to which Production Credit objects is entitled the "Inter-system transfer of funds and equities" and provides in relevant part that:

> (c) The FCA may direct a transfer of funds or equities between two or more federal land bank associations or two or more Production Credit Associations in districts where it determines that such transfer [is financially necessary to support a district bank, a credit association, or to implement a system plan of financial assistance to a district bank].

12 C.F.R. § 611.1145 (1986).

This regulation was issued in reliance upon 12 U.S.C. § 2252(a)(11), which gives the Farm Credit Administration power to "[r]egulate the borrowing, repayment, and transfer of funds and equities between institutions of the System." *See* 12 C.F.R. § 611.1145(a). The regulation was promulgated out of a concern that should any agency within the system "default on its obligation to repay a System-wide bond for which the bank is primarily liable. . . , the volume and price aspects of System funding would be very negatively affected." 50 Fed. Reg. 36985-86 (1985).

On September 13, 1985, Production Credit filed their complaint, alleging that the regulation, 12 C.F.R.

§ 611.1145, was contrary to law because it granted the Farm Credit Administration power to "direct" fund transfers when Congress had merely given the Farm Credit Administration power to "regulate" the transfer of funds in 12 U.S.C. § 2252(a)(11). They also argued that the regulation was adopted without proper notice and comment as required by the Administrative Procedure Act, that adoption of the regulation was arbitrary, capricious and an abuse of discretion, and that the regulation deprived plaintiffs of property without due process and without compensation in violation of the fifth amendment. Production Credit sought to enjoin defendants from enforcing the provisions of the regulation. The Farm Credit Administration has not yet utilized, however, the regulation to direct plaintiffs to make any transfers of assets. For the reasons explained below, we find that the claims are not ripe for judicial review, and, thus, this court lacks subject matter jurisdiction over this matter.

In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), and its two companion cases, *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158 (1967), and *Gardner v. Toilet Goods Ass'n, Inc.*, 387 U.S. 167 (1967), the Supreme Court outlined the ripeness doctrine in the context of judicial review of administrative action. The purpose of the ripeness doctrine the Supreme Court stated, is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories*, 387 U.S. at 148-149.

The resolution of issues of ripeness necessitates a two-part inquiry. "Courts must first 'determine whether the issues tendered are appropriate for judicial resolution,' and then 'assess the hardship to the parties if judicial

relief is denied at that stage.'" *Young v. Klutznick*, 652 F.2d 617, 625 (6th Cir. 1981), (quoting *Toilet Goods Ass'n v. Gardner*, 387 U.S. at 162.) These two prongs of the ripeness test necessitate, as the court in *Abbott* noted, the examination of four factors: (1) whether the issues presented are purely legal; (2) whether the challenged agency action is "final agency action" within the meaning of the Administrative Procedure Act; (3) whether the challenged action would have a direct and immediate impact on the party bringing suit; and (4) whether immediate resolution would foster, rather than impede, effective enforcement and administration by the agency. 387 U.S. at 149-54.

For a claim to be ripe, both prongs of the ripeness test must be satisfied for us to exercise jurisdiction. Thus, we will not review challenges to regulations unless the regulation has a direct and immediate impact on the parties bringing the challenge. *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 479 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 1616 (1987).

While the plaintiffs' challenges involved purely legal questions of a regulation that constitutes final agency action, there is absolutely no evidence in the record before us to suggest that the impact of the regulations imposes any duty or burden of compliance upon Production Credit at this time. They do not and cannot allege that they have been directed to transfer any funds pursuant to the challenged regulation. There is, at this time, no indication that the regulation will indeed ever be applied to them. The record supports the district court's conclusion that "there is no clear threat of application of the regulation to plaintiffs in the future and the regulation imposes no affirmative duty of compliance on plaintiffs."

Because they will suffer no hardship if this court does not act now, and because their primary conduct is unaffected by the continued existence of the regulation,

we hold that the challenge to the regulation is not ripe for judicial review. Should the Farm Credit Administration ever attempt to direct plaintiffs to transfer assets, such transfers could be quickly enjoined, thereby ensuring that plaintiffs' rights are protected until the validity of the regulation is determined. We emphasized that we are expressing no opinion on the merits of Production Credit's challenges to the validity of the regulation at this time.

Accordingly, the district court's decision that plaintiffs' challenges are not ripe for judicial review is hereby affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C 85-7858

PRODUCTION CREDIT ASSOCIATION OF NORTHERN OHIO, *et al.*,
Plaintiffs,

—vs—

FARM CREDIT ADMINISTRATION, *et al.*,
Defendants.

[Filed Mar. 23, 1987]

OPINION AND ORDER

WALINSKI, J.

This cause is before the Court on plaintiff's motion for preliminary injunction, with defendants' opposition thereto, and on defendants' motion to dismiss or for summary judgment, along with plaintiffs' opposition (under seal), and defendants' reply thereto. Also before the Court are a multitude of supplemental filings in support of the parties' respective motions. A hearing on the motions was held on August 29, 1986 and this matter is therefore decisional.

The plaintiffs, Production Credit Association of Northern Ohio (hereafter "PCA") and its directors and shareholders brought this action for declaratory and injunctive relief to enjoin an alleged attempt by defendants to deprive PCA shareholders of their property. Defendants are the Farm Credit Administration (hereafter "FCA"),

Donald J. Wilkinson, Governor of the FCA, the Federal Farm Credit Board (hereafter "Federal Board") and its thirteen board members.[1] Jurisdiction is predicated upon 28 U.S.C. §§ 1331 and 1332.

FINDINGS OF FACT

Plaintiffs challenge the validity of a regulation approved by the Federal Board. The Federal Board is the policy making body for the FCA. 12 U.S.C. §§ 2242, 2243. The regulation, codified at 12 C.F.R. § 611.1145 (1986), authorizes the FCA in certain circumstances to order funds transferred from one production credit association to another.

In terms of background, the FCA is an agency in the executive branch of government which supervises and coordinates the "Farm Credit System." The FCA derives its authority from the Farm Credit Act of 1971, as amended, 12 U.S.C. § 2001, *et seq.* Congress established the Farm Credit System during the depression in order to provide low interest loans to farmers, ranchers, harvesters of aquatic products and other farm-related businesses. Consisting of a series of banks and associations, the Farm Credit System forms a permanent network of credit for agricultural producers that is owned by its borrower members and operates on a cooperative basis. The The system is divided into twelve districts, each containing a federal land bank, which makes long-term loans, numerous federal land bank associations, which may borrow from that districts' federal land bank, a federal intermediate credit bank, which provides short-term and intermediate-term credit to the product credit associations, numerous product credit associations, and a bank for cooperatives.[2] Plaintiff PCA is one of approximately 340

[1] Claims against two other defendants were dismissed by this Court's Order of June 13, 1986.

[2] There are other components in the Farm Credit System including boards for each district which also serve as the board of directors for the banks within that district.

product credit associations within the system that are authorized to extend or guarantee agricultural credit on a short-term or intermediate-term basis. The borrowers own all of the stock in each product credit association and the product credit associations own stock in the federal intermediate credit banks.

Funding of the Farm Credit System is debt capital obtained through the sale of bonds in the national capital markets. Because of joint and several liability of the entities within the Farm Credit System on systemwide bonds, 12 U.S.C. § 2155, and their sponsored agency status, the bonds enjoy preferential status in the money markets. This permits the Farm System to obtain a large volume of funds at costs below competing financial institutions in order to provide farmers with continual credit at low rates.

With the onset of financial problems within several districts of the Farm Credit System, the Federal Board approved the regulation to which plaintiffs object. Entitled the "Inter-System transfer of funds and equities" the regulation provides in relevant part that:

> Section 5-18(11) of the Act authorizes the FCA to regulate the borrowing, repayment, and transfer of funds and equities between institutions of the System . . . . This section sets forth the circumstances and procedures under which the FCA may direct such a transfer of funds and equities based on its determination which respect to the financial condition of one or more institutions of the System. . . .
>
> (b) [governing the sharing of funds between banks]
>
> . . . .
>
> (c) The FCA may direct a transfer of funds or equities between two or more Federal land bank asso-

ciations or two or more production credit associations in districts where it determines that such transfer:

(1) Is necessary to provide financial support to the district bank in which those associations are stockholders based on application of the criteria to the bank as set forth in paragraph (b) of this section; or

(2) Is necessary to provide financial support to one or more other like associations in the district based on application of the criteria set forth in paragraphs (b) (2) or (b) (4) of this section to the associations, provided that in applying paragraph (b) (4) (ii) of this section the ratio of outstanding indebtedness to capital and surplus of the receiving association (s) shall not exceed 9 to 1; or

(3) Is an integral part of a plan that has been adopted by other institutions of the System, and approved by the FCA, under which those institutions will extend financial assistance to the district bank in which those associations are stockholders.

(d) A direction by the FCA for a transfer of funds or equities pursuant to this section shall be signed by the Governor and shall establish the amount, timing, duration, repayment, and other terms of assessments necessary to accomplish such transfer, taking into consideration the financial condition of each institution to be assessed. Where the FCA directs a transfer of funds or equities between associations under paragraph (c) (1) or (c) (2) of this section, it may authorize the district bank in which such associations are stockholders to accomplish the necessary assessments through debits and credits to the accounts of the bank.

12 C.F.R. § 611.1145 (1986).

Section (c) of the foregoing regulation provides that the FCA may direct the transfer of funds or equities

between production credit associations where financially necessary to support their district bank, to support one another, or to implement a system plan of financial assistance to their district bank. (*Id.*) The regulation was issued in reliance upon 12 U.S.C. § 2252(a)(11) which gives the FCA power to "[r]egulate the borrowing, repayment, and transfer of funds and equities between institutions of the System." *See* 12 C.F.R. § 611.1145(a). The rationale for issuance of the regulation was set forth in the preamble to 12 C.F.R. § 611.1145 which states that the Farm Credit System "has used systemwide bonds and discount notes almost exclusively over the last several years to finance lending activity" and that "[s]hould any bank [within the System] default on its obligation to repay a Systemwide bond for which the bank is primarily liable . . ., the volume and price aspects of System funding would be very negatively affected." 50 Fed. Reg. 36985-86 (1985). The preamble states further that "[b]ecause of the dependence on the funding mechanism, it is imperative that the System address each district's financial problems swiftly in order to maintain investors' confidence that the System is effectively managing its assets and financial resources and will have no difficulty paying interest or principal on bonds as due." 50 Fed. Reg. 36986 (1985).

This regulation was published in the Federal Register on September 11, 1985, effective immediately. 50 Fed. Reg. 36985-87 (1985). A thirty-day period for public comment was provided, which was extended an additional thirty days. 50 Fed. Reg. 42513-14 (1985). In approving issuance of the regulation, the Federal Board "determined that the financial condition of the banks and associations in a number of districts requires that the FCA have fully implemented its power under the Act to regulate the sharing of resources between System institutions." 50 Fed. Reg. 36986 (1985). "Thus, the Federal Board found that public notice and publication for comment [we]re not necessary and are contrary to the public interest." *Id.*

On September 13, 1985, plaintiffs filed their complaint. Count III [3] of the complaint alleges that the regulation, 12 C.F.R. § 611.1145, is contrary to law because it grants the FCA power to "direct" fund transfers when Congress has allegedly in 12 U.S.C. § 2252(a)(11) given the FCA power merely to "regulate" the transfer of funds. Count IV contends that the regulation was adopted without prior notice and opportunity to comment as required by the Administrative Procedure Act, as amended, 5 U.S.C. § 553(b). Count V claims that defendants' adoption of the regulation was arbitrary, capricious and an abuse of discretion. Counts VI through VIII claim that the regulation deprives plaintiffs of property without due process and without compensation, in violation of the Fifth Amendment. Based upon these allegations, plaintiffs seek judgment declaring 12 C.F.R. § 611.1145 invalid and enjoining defendants from enforcing the provisions of the regulation. To date, defendants have not utilized the regulation to direct plaintiffs to make any transfers of assets.

Defendants oppose the issuance of a preliminary injunction and move the Court either to dismiss plaintiffs' claims or grant defendants summary judgment. In its Order of September 17, 1985, this Court denied plaintiffs' earlier motion for a temporary restraining order. For the reasons which follow, the Court will grant defendants' motion for summary judgment and deny plaintiffs' motion for preliminary injunction.

CONCLUSIONS OF LAW

Rule 56, Fed. R. Civ. P., directs the disposition of a motion for summary judgment. In relevant part Rule 56(c) states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interroga-

[3] On plaintiffs' motion for voluntary dismissal, Counts I and III were dismissed by this Court's order of June 13, 1986.

> tories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The Court's function in ruling on a motion for summary judgment is to determine if any genuine issue exists for trial, not to resolve any factual issues, and to deny summary judgment if material facts are in dispute. *United States v. Articles of Device*, 527 F.2d 1008, 1011 (6th Cir. 1976); *Tee-Pak, Inc. v. St. Regis Paper Co.*, 491 F.2d 1193, 1105 (6th Cir. 1974). Further, "[i]n ruling on a motion for summary judgment, the evidence must be viewed in a light most favorable to the party opposing the motion. *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1324 (6th Cir. 1983). To summarize, summary judgment is only appropriate when no genuine issue of material fact remains to be decided, and when the undisputed facts, viewed in a light most favorable to the non-moving party, entitle the movant to judgment as a matter of law. *Smith v. Pan Am World Airways*, 706 F.2d 771, 773 (6th Cir. 1983).

A principle purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2553 (1986). Rule 56(e) places responsibility on the party against whom summary judgment is sought to demonstrate that summary judgment is improper, either by showing the existence of a material question of fact or that the underlying substantive law does not permit such a decision. In relevant part the provision states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial.

> If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), Fed. R. Civ. P. Rule 56(e) requires the non-moving party to go beyond the pleadings, and by affidavits, depositions, answers to interrogatories, or admissions on file, designate specific facts showing a genuine issue for trial. *Celotex Corp. v. Catrett*, 106 S.Ct. at 2553.

In seeking summary judgment, defendants argue first that this case is not ripe for judicial review and alternatively, that plaintiffs' claims have no merit under the law. The ripeness doctrine, especially when discretionary relief in the form of injunctive and declaratory judgments regarding agency rulings is sought, prevents courts "through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967).

Several factors must be evaluated to determine if a case is ripe for review. First, whether the issue involved is a purely legal one. *Id.* at 149. It is undisputed that the issues raised by plaintiffs in the case *sub judice* are legal rather than factual.

Second, whether the regulation is a final agency action. *Id.* at 149-151. Again, it is undisputed that 12 C.F.R. § 611.1145 was issued in final form, made effective upon publication.

The third factor is whether "the impact of the regulations upon the [plaintiffs] is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Id.* at 152. The regulation in this case has no direct or immediate effect on plaintiffs. The FCA is only permitted under 12 C.F.R. § 611.1145

to transfer funds if certain criteria exist and financial support is needed within a particular district according to the specifications listed. No transfer has yet been ordered (Edward Aff. at § 19) and the banks and associations in plaintiffs' district may never come within these standards. There is no clear threat of application of the regulation to plaintiffs in the future and the regulation imposes no affirmative duty of compliance on plaintiffs.

As in *Toilet Goods Association v. Gardner*, where a regulation allowed the Food and Drug Administration to suspend certification given to color additive manufacturers if inspections were refused, "this is not a situation in which primary conduct is affected." 387 U.S. 158, 164 (1967). No "contracts must be negotiated, ingredients tested or substituted or special records compiled." *Id.* The impact of the regulation cannot be "said to be felt immediately by those subject to it in conducting their day-to-day affairs." *Id.* Although no wrong need yet have been committed or loss occurred to obtain a declaratory judgment, the impact on plaintiffs must be of sufficient immediacy to warrant review. Plaintiffs herein have failed to present any evidence that transfer of their assets is imminent or even contemplatd by the FCA.

Finally, a fourth factor involves assessing the hardship to parties if judicial relief is denied at this stage. *South Carolina Electric & Gas Co. v. Interstate Commerce Commission*, 734 F.2d 1541, 1545 (7th Cir. 1984); *Young v. Klutznick*, 652 F.2d 617, 625-26 (6th Cir. 1981), *cert. denied*, *Young v. Baldridge*, 455 U.S. 939 (1982). Plaintiffs suffer no hardship if this Court does not act now. If the FCA ever determines that product credit associations in plaintiffs' district should transfer assets, such transfers could be enjoined and plaintiffs' rights protected until the validity of 12 C.F.R. § 611.1145 is determined. No "irremediable adverse consequences

flow from requiring a later challenge." *Toilet Goods Association v. Gardner*, 387 U.S. at 164. Although plaintiffs argue that the mere existence of the regulation adversely affects their interest rates and deters potential investors; even viewing the evidence most favorably to plaintiffs, the record reveals no facts in support of such speculative contentions.

The threshold question of ripeness is a limitation on the Court's jurisdiction. In light of the above analysis the Court finds that this case is not ripe for judicial resolution. Accordingly, defendants are entitled to judgment as a matter or law.

Even assuming *arguendo* that this matter withstood the test of ripeness, plaintiffs are not entitled to a preliminary injunction and defendants should be granted judgment on the merits of plaintiffs' claims. To issue a preliminary injunction, the Court is required to balance four factors:

1. Whether the movant has shown a strong or substantial likelihood or probability of success on the merits.

2. Whether the movant has shown irreparable injury.

3. Whether the preliminary injunction could harm third parties.

4. Whether the public interest would be served by issuing the preliminary injunction.

Frisch's Restaurant, Inc. v. Shoney's, Inc., 759 F.2d 1261, 1263 (6th Cir. 1985); *Mason County Medical Ass'n v. Knebel*, 563 F.2d 256, 261 (6th Cir. 1977).

Initially, plaintiffs have failed to demonstrate a likelihood of success on the merits. All four of plaintiffs challenges to the validity of the regulation are without merit. The broad discretion given to the FCA by Con-

gress in supervising and regulating the Farm Credit System and the breadth of 12 U.S.C. §§ 2252(a)(11), (16) and (17) give the FCA sufficient statutory authority to have issued 12 C.F.R. § 611.1145. The legislative history, cited by the parties, including recent amendments to the Farm Credit Act, is not sufficiently clear to uphold plaintiffs' position and plaintiffs' arguments over symantics are unpursuasive. The language "regulate . . . the transfer of funds" contained in 12 U.S.C. § 2252(a)(11) is broad enough to encompass a regulation that enunciates specified circumstances under which funds may be transferred. Similarly, plaintiffs' argument that the existence of 12 U.S.C. § 2151-2153 [4] precludes the issuance of 12 C.F.R. § 611.1145 undermines the inherent flexibility of the rulemaking authority Congress vests in the FCA. The issuance of the regulation is not beyond the FCA's statutory power. Thus, defendants should prevail as to Count III of plaintiffs' complaint.

As to Count IV, the general notice requirements of 5 U.S.C. § 553 are not applicable in certain circumstances. One is "when the agency for good cause finds (and incorporates that finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). The FCA properly invoked this exception. The reasons stated in the preamble of 12 C.F.R. § 611.1145 for waiving advance notice and comments were justified by the precarious financial condition of institutions in several districts. (Edwards Aff. at ¶¶ 8-15). Provision of a comment period subsequent to the regulation's effective

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[4] 12 U.S.C. §§ 2151-2153 provide for stock purchases by the United States in product credit associations as a temporary investment to help meet emergency credit needs of borrowers, a revolving fund for the same purposes, supervised borrowing between institutions of the Farm Credit System or other lenders, and consolidated issuance of notes.

date also offered some protection to plaintiffs. Defendants are therefore entitled to summary judgment on Count IV.

Count V claims that defendants were arbitrary, capricious and abused their discretion. Congress provided in 5 U.S.C. § 706(2)(a) that "[a] reviewing court shall . . . set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." The Court must carefully "consider whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). The Court may not "substitute its judgment for that of the agency." *Id.* The preamble of 12 C.F.R. § 611.1145 establishes that defendants considered numerous factors in developing the concept of directing fund transfers and the restrictions placed thereon. After careful review, the Court is unable to find a clear error of judgment or any evidence of arbitrary or capricious conduct. Thus, Count V is without merit.

Counts VI through VIII are constitutional challenges. Plaintiffs were not denied due process and since no transfers have been made, clearly have suffered no taking of their property. Accordingly, even viewing the evidence in a light most favorable to plaintiffs, they are unable to succeed on the merits of their claims.

Next, plaintiffs have failed to establish any irreparable injury. In fact, as the earlier discussion concerning the lack of direct or immediate impact on plaintiffs demonstrates, as of yet, no harm whatsoever has befallen plaintiffs, and plaintiffs, along with other product credit associations, may never feel the effects of the regulation.

Finally, the third and fourth factors considered in issuing a preliminary injunction need not be balanced

since plaintiffs' showing as to the first factors, the likelihood of success and the presence of irreparable harm, falls quite short. Accordingly, even if this matter was ripe for judicial review, for the foregoing reasons, plaintiffs would not be entitled to a preliminary injunction and summary judgment should be for defendants on all counts of plaintiffs' complaint.

It is therefore,

ORDERED that defendants' motion to dismiss or in the alternative for summary judgment is granted.

FURTHER ORDERED that this cause is dismissed.

/s/ Nicholas J. Walinski
Senior U.S. District Judge

Toledo, Ohio
March 23, 1987

I hereby certify that this instrument is a true and correct copy of the original on file in my office.

Attest: James S. Gallas
U.S. District Court
Northern Dist. of OH

By: /s/ Don E. Weaver
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 87-3390

PRODUCTION CREDIT ASSOCIATION OF NORTHERN OHIO, *et al.*,
Plaintiffs-Appellants,

v.

FARM CREDIT ADMINISTRATION;
FEDERAL INTERMEDIATE CREDIT BANK OF LOUISVILLE,
Defendants-Appellees.

[Filed May 17, 1988]

Before: KEITH and MARTIN, Circuit Judges; and COOK, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same hereby affirmed.

IT IS FURTHER ORDERED that Defendants-Appellees recover from Plaintiffs-Appellants the costs on appeal,

as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN
Clerk

/s/ John P. Hehman
Clerk

A True Copy.

Attest:

/s/ Gary McCarthy
Deputy Clerk

Issued as Mandate: June 7, 1988

COSTS:	None
Filing fee.....	$
Printing.....	$
Total.....	$

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION

Docket Number C 85-7858

PRODUCTION CREDIT ASSOCIATION OF NORTHWESTERN OHIO, *et al.*

Plaintiffs,

v.

FARM CREDIT ASSOCIATION, *et al.*,

Defendants.

JUDGE NICHOLAS J. WALINSKI

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Defendants motions to dismiss or in the alternative for summary judgment is granted.

Case dismissed.

DATE 3/24/87 /s/ Nicholas J. Walinski
Senior U.S. District Judge

I hereby certify that this instrument is a true and correct copy of the original on file in my office.

Attest: James S. Gallas
U.S. District Court
Northern Dist. of OH

By: /s/ Don E. Weaver
Deputy Clerk

JAMES S. GALLAS
Clerk

/s/ Don E. Weaver
(By) Deputy Clerk

FCA REGULATIONS

§ 611.1130 Inter-System transfer of funds and equities.

(a) Section 5.18(11) of the Act authorizes the FCA to regulate the borrowing, repayment, and transfer of funds and equities between institutions of the System, including banks, associations, and service organizations organized under the Act. This section sets forth the circumstances and procedures under which the FCA may direct such a transfer of funds and equities based on its determination with respect to the financial condition of one or more institutions of the System. For purposes of this section, the term "bond" refers to long-term notes, bonds, debentures, or other similar obligations, or short-term discount notes issued by one or more banks pursuant to section 4.2 of the Act.

(b) The FCA may direct a transfer of funds or equities by one or more banks of the System to another bank of the System where it determines that:

(1) The receiving institution will not be able to make payments of principal or interest on bonds for which it is primarily liable within meaning of section 4.4(a) of the Act; or

(2) The common or preferred stock, participation certificates, or allocated equities of the receiving institution have a book value less than their par or stated values; or

(3) The total bonds outstanding for which the receiving institution is primarily liable exceed 20 times the combined capital and surplus accounts of the bank; or

(4) Based on the application to it of one or more of the following ratios, the receiving institution is not financially viable in that it will not be able to continue to extend new or additional credit or financial assistance to its eligible borrowers;

(i) The ratio of stock to earned net worth (including legal reserve, unallocated and reserved surplus, undistributed earnings, and allowance for losses) exceed 2 to 1;

(ii) The ratio of the outstanding bonds to capital and surplus exceeds 15 to 1;

(iii) Nonearning assets (any noninterest-bearing assets, icluding but not limited to cash, nonaccrual loans, net fixed assets, acquired property, accrued interest receivable, and accounts receivable) exceed 15 percent of total assets;

(iv) Lendable net worth (interest-bearing assets less interest-bearing liabilities) is zero or less.

(c) The FCA may direct a transfer of funds or equities between two or more Federal land bank associations or two or more production credit associations in district where it determines that such transfer:

(1) Is necessary to provide financial support to the district bank in which those associations are stockholders based on application of the criteria to the bank as set forth in paragraph (b) of this section; or

(2) Is necessary to provide financial support to one or more other like associations in the district based on application of the criteria set forth in paragraphs (b)(2) or (b)(4) of this section to the associations, provided that in applying paragraph (b)(4)(ii) of this section the ratio of outstanding indebtedness to capital and surplus of the receiving association(s) shall not exceed 9 to 1; or

(3) Is an integral part of a plan that has been adopted by other institutions of the System, and approved by the FCA, under which those institutions will extend financial assistance to the district bank in which those associations are stockholders.

(d) A direction by the FCA for a transfer of funds or equities pursuant to this section shall be signed by the Chairman and shall establish the amount, timing, dura-

tion, repayment, and other terms of assessments necessary to accomplish such transfer, taking into consideration the financial condition of each institution to be assessed. Where the FCA directs a transfer of funds or equities between associations under paragraph (c) (1) or (2) of this section, it may authorize the district bank in which such associations are stockholders to accomplish the necessary assessments through debits and credits to the accounts of the bank.